



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 364 OF 2010

PETER MULE MUTHUNGU.....PLAINTIFF

(Suing as administrator and personal

representative of the estate of JANE MUENI NGUI)

V E R S U S –

KENYATTA NATIONAL HOSPITAL.....DEFENDANT

RULING

1) Kenyatta National Hospital, the defendant herein, took out the motion dated 9.10.2018 in which it sought for the following orders *inter alia*:

1. Spent

2. Spent

3. THAT the honourable court be pleased to order stay of proceedings pending hearing and determination of the intended appeal.

4. THAT this honourable court be pleased to review its orders granted on 27th September, 2018.

5. In the alternative, that the honourable court be pleased to grant leave to the defendant to appeal from orders issued on 27th September, 2018.

6. THAT the honourable court be pleased to set down the matter for further hearing.

7) THAT costs of this application be in the cause.

2) The motion is supported by the affidavit of Calvin Nyachoti, the defendant's corporation secretary. Peter Mule Muthungu, the plaintiff herein filed grounds of opposition to resist the application. When the motion came up for interpartes hearing, learned counsels appearing in the matter made oral submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the motion plus the grounds of opposition. I have further considered the rival oral submissions made by learned counsels.

4) The facts deponed in the supporting affidavit are largely undisputed by the plaintiff. It is the submission of the defendant/ applicant that when this suit came up for mention on 30.11.2016 to confirm whether a settlement would be recorded, this court made an order granting the plaintiff costs of ksh.35,000/= being witness expenses incurred on 26.10.2016 when the case could not proceed for hearing because the defendant had made an offer to settle the matter. It is argued that this court should not have made such a

substantive order during a mention. The defendant argued that this court had made a similar order on 3rd May 2016 therefore the defendant should not be penalised twice.

5) The defendant further argued that on 27.9.2018, this court proceeded to issue an order setting down the matter for judgment yet it had been fixed for mention to take convenient hearing dates. This court was beseeched to review and set aside the order and grant the defendant an opportunity to defend the suit or in the alternative grant the defendant leave to appeal and to further stay proceedings.

6) The plaintiff vehemently opposed the motion arguing that the application amounts to an abuse of the court process. The plaintiff pointed out that the defendant had intentionally caused the hearing of the suit to stall by hoodwinking the plaintiff that it was in a position to settle the matter. The plaintiff further argued that if the defendant settles the witness expenses assessed at ksh.35,000/= he would be in a position to indulge the defendant to have the defence present their case.

7) Having considered the material placed before this court together with the rival submissions, it is apparent that the defendant is basically seeking for a chance to be heard and for leave to challenge the order directing it to pay witness expenses assessed at ksh.35,000/=.

8) It is also clear from the recorded proceedings, that this matter had been listed for defence hearing on several occasions but the same could not proceed for hearing because the court was not sitting. It is also apparent from the record that on 27.9.2018, this case came up for mention to fix a hearing date but the court instead proceeded to fix a judgment date.

9) The court also noted the defence case was closed on 2nd May 2016. It has since emerged that no order was made by this court to close the defence case on 3/5/2016. With respect, I agree that there is an error apparent on the face of record. This court inadvertently made an order to list the matter for judgment before the defence case was closed. The plaintiff and his counsel did not in any case apply for the defendant's case to be closed after the closure of that of the plaintiff.

10) It is also apparent that this court issued an order directing the defendant to pay a sum of ksh.35,000/= to cover witness expenses incurred when the suit came up for hearing on 26.10.2016. It is clear from the record that the defendant's advocate was not heard on this issue before the court made the order. The advocate who appeared before court as holding brief for Miss Karanja did not address this court over the issue of payment of witness expenses incurred on 26.10.2016. For the above reasons, I am satisfied that the defendant is entitled to the order for review.

11) In the end, I find the defendant's motion to be meritorious. I allow the motion and make the following orders and directions:

- i. The order fixing this suit for judgement on 2/11/2018 is set aside.**
- ii. The order directing the defendant to pay ksh.35,000/= made on 9/2/2017 is set aside.**
- iii. Parties are at liberty to submit arguments in respect of the question as to whether or not the plaintiff was entitled to be paid ksh.35,000/= as witness expenses incurred on 26.10.2016.**
- iv. The suit to be fixed for defence hearing on priority basis within the next 30 days.**
- v. Each party to bear its own costs of the motion.**

Dated, Signed and Delivered in open court this 24th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant